

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 2, 2003 Session

PATRICIA WATTERSON v. BENNY BYRD AND LINDA BYRD

**Direct Appeal from the Circuit Court for Sevier County
No. 2001-261-II Hon. Richard R. Vance, Circuit Judge**

FILED JANUARY 26, 2004

No. E2003-00924-COA-R3-CV

Plaintiff was injured in a fall while being chased by a dog. Plaintiff claimed defendants had harbored the dogs on their property, but the Trial Court granted summary judgment. We vacate on the grounds that there is disputed material evidence as to the applicability of Tenn. Code Ann. § 44-8-408.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded.

HERSCHEL PICKENS FRANKS, J. delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Scott D. Hall, Sevierville, Tennessee, for Appellant.

Steven E. Marshall, Sevierville, Tennessee, for Appellees.

OPINION

Plaintiff appeals from a summary judgment granted to Benny and Linda Byrd, who were constructing an apartment complex across the street from where plaintiff lived at the time she was chased by a dog that “lived” on defendant’s property, and sustained injuries from a fall while being chased.

In order for a movant to be granted summary judgment, there must be no genuine issues of material fact. Tenn. R. Civ. P. 56. In considering the motion, the Court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow reasonable inferences in favor of that party, and discard all countervailing evidence. *Byrd v. Hall*, 847 S.W.2d 201-210 (Tenn. 1993). Our review of a grant of summary judgment is *de novo* on the record, according the trial judge no presumption of correctness in the granting of the judgment.

Plaintiff relies on Tenn. Code Ann. § 44-8-408 to recover damages for her injuries. That statute in pertinent part reads:

Dogs not allowed at large - Exception. - It is unlawful for any person to allow a dog belonging to or under the control of such person, or that may be habitually found on premises occupied by the person, or immediately under the control of such person, to go upon the premises of another, or upon a highway or upon a public road or street; . . . (Emphasis supplied).

Plaintiff's testimony stated that defendants Benny and Linda Byrd owned an apartment building across the street from where she lived at the time of the attack. She stated the stray dogs lived on the construction site and had shelter there in the unfinished apartments, and ate food and scraps from construction workers. Plaintiff further testified the dogs had a litter of puppies over on the construction site and that one of the dogs was a Rottweiler and the other a black hound. She also testified that she had been threatened by the dogs in April of 2000 and that she had seen them every day on the site for six or seven months.

The Trial Court, in granting summary judgment, found that plaintiff claimed the defendants were liable because they harbored dangerous animals or allowed animals to run at large. The Court found the dogs were strays and were not owned by anyone, but apparently frequented the property owned by the defendants. The Court reasoned that the defendants did not live on the land, and that even if the defendants knew about the dogs, they were still stray dogs that defendants had no control over, and thus granted summary judgment to defendants.

The statute does not require that the dogs be owned by the defendants, but liability may be imposed for dogs "habitually found on premises occupied by the person" who allows the dogs to run at large. The statute onerates the occupier of the property with the responsibility for dogs "habitually found" on the property. Black's Law Dictionary defines "an occupier" as "one who is in the enjoyment of a thing" and "occupancy" as taking possession of property and use of the same. *Black's Law Dictionary*, 1078, 1079, 6th Ed. 1990. It is said that occupant and occupier are synonymous and have historically been used in legal writing to denote "one who takes possession of property". The *Dictionary of Modern Legal Usage*, 2nd Edition, *Garner*, p.612. There is material evidence that defendants occupy the property. The evidence establishes that they were constructing apartments on the site over a period of years, and defendant Benny Byrd testified that "during the time in question, I was constructing apartments on my property and was present every day".

The record presents disputed issues of material fact as to whether plaintiff's action fall within the ambit Tenn. Code Ann. § 44-8-408.

For the foregoing reasons, we vacate the summary judgment and remand for further proceeding consistent with this opinion. The costs of the appeal are assessed to defendants Benny and Linda Byrd.

HERSCHEL PICKENS FRANKS, J.